IN THE

Supreme Court of the United States

No. 611

October Term, 1947.

LOEW'S INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, STANLEY COMPANY OF AMERICA, INC., UNIVERSAL FILM EXCHANGES, INC. and UNITED ARTISTS CORPORATION,

Petitioners,

v.

WILLIAM GOLDMAN THEATRES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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MISCELLANEOUS.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent that:

STATEMENT OF THE MATTER INVOLVED.

This is one of three actions brought by the respondent, a theatre operator in Philadelphia, under the Sherman and Clayton Acts (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. 1-4; Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. A. 15). It has recovered $125,000 which was trebled. In a second suit respondent seeks to recover $8,400,000 (R. 1308).

The complaint charges the petitioners with a conspiracy, (a) to monopolize the first run exhibition of motion pictures in Philadelphia, and (b) to refuse to license to respondent for first run exhibition in the Erlanger Theatre in Philadelphia, the motion pictures distributed by them.

Throughout the proceedings, the petitioners have been referred to in two groups known, respectively, as the Warner defendants and as the distributor defendants.

In the former category are Warner Bros. Pictures, Inc., Vitagraph, Inc., (now called Warner Bros. Pictures Distributing Corporation) Warner Bros. Circuit Management Corporation, and Stanley Company of America, Inc. Vitagraph, Inc., a subsidiary of Warner Bros. Pictures, Inc., distributes motion pictures. Stanley Company of America, Inc., is a subsidiary owning and operating motion picture theatres in Philadelphia, among which were, during the period involved in the litigation, all the so-called first run theatres in downtown Philadelphia. Hereinafter, the Warner defendants are sometimes referred to as "Warners".

The distributor defendants (hereinafter collectively called "the distributors") are Loew's, Incorporated, Paramount Pictures, Inc., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc. and United Artists Corporation. Hereinafter, these petitioners will be called "Loew's", "Paramount", "RKO", "Twentieth Century-Fox", "Columbia", "Universal", and "United Artists". All of them distribute motion pictures. Loew's, Paramount, RKO and Twentieth Century-Fox also own or operate motion picture theatres in certain places. Columbia, Universal and United Artists do not own or operate theatres anywhere.

The respondent is a Delaware corporation, all of the stock of which is owned by William Goldman (Exhibits P-29-30, R. 446a; R. 392a, 393a). It operates a chain of

motion picture theatres in Philadelphia and elsewhere in Pennsylvania.

Petitioners filed answers (R. 17a-37a) to the complaint (R. 8a) denying the conspiracy charged by respondent.

The initial trial was held beginning November 15, 1943, before Kirkpatrick, J., of the District Court of the United States for the Eastern District of Pennsylvania (R. 267a, et seq.). By agreement, the testimony was confined to matters relating to liability. Evidence on damages was deferred.

At the trial, the respondent showed that:

The Stanley Company of America was a pioneer in the first run motion picture business in Philadelphia (See Exhibit P-37, R. 453a; R. 1132a-1134a). Upon its organization on July 1, 1919, it acquired the Stanton Theatre from a predecessor company which had apparently erected it in 1914.

In 1921, the Stanley Company erected the Stanley Theatre; in 1924, the Earle Theatre; and in 1929, the Mastbaum Theatre. These are the largest first run motion picture theatres in Philadelphia, having seating capacities, respectively, of 2,911, 2,764 and 4,387 (Exhibit P-36, R. 1132a; R. 452a).

In 1922, the Stanley Company leased, upon completion, the Aldine Theatre. The lease was for a term of 20 years, expiring August 6, 1942. The lease was renewed to August 6, 1947, but on March 17, 1943, the theatre was purchased by the Stanley Company.

In 1929, the Stanley Company purchased the Boyd Theatre from an individual, Alexander R. Boyd; and in 1936, it leased the Fox Theatre from a subsidiary of Twentieth Century-Fox, for a term of 3 years, which was later extended for an additional 5 years.

Thus, the only first run theatres acquired by the Stanley Company from competitiors were the Boyd Theatre (in 1929); and the Fox Theatre (in 1936).

The Record is completely silent as to the circumstances under which these theatres were acquired, except that the renewal lease for the Fox Theatre was offered in evidence by the plaintiff (R. 455a; Exhibit P-40, R. 1135a, et seq.). The lease provided for the payment of an annual rental in the amount of $134,000; that Warners should exhibit in the Fox Theatre all pictures produced by Twentieth Century-Fox, unless, by mutual agreement, Twentieth Century-Fox permitted them to be exhibited elsewhere (R. 120a); and that the lease could be terminated at any time on 5 days' notice for breach of Warners' agreement to exhibit Twentieth Century-Fox pictures in the theatre.

There was no evidence that Warners engaged in any coercive or other unlawful practices in acquiring any of its first run theatres, or that any of petitioners, except Twentieth Century-Fox, had anything whatever to do with their acquisition.

There was no evidence that during the time when the Boyd and Fox Theatres were not operated by Warners, their then operators had any difficulty whatever in obtaining product from any of the distributors.

The several distributors licensed their pictures for first run exhibition in the first run theatres in Philadelphia available to them. License agreements were made at different times, for different periods, and on different terms.

No evidence established any improper or unlawful practice in the conduct of their first run theatres by Warners or in the licensing of pictures for first run exhibition in Philadelphia at any time prior to the respondent's lease of the Erlanger Theatre on November 9, 1940.

The Erlanger Theatre was erected in 1927 by Erlanger and Dillinger, producers of stage shows, who had a 2/3 interest, and the Stanley Company, which had a 1/3 interest. The theatre was intended primarily as a stage show theatre. It was said to have cost $2,500,000 (See R. 1033a). It has

a seating capacity of 1,859, and has fine appointments, including sound equipment (R. 348a-349a), but was erected, to use the trial judge's language, "on the fringe of the downtown theatre district" (R. 975a). It is located at a point where pedestrian traffic is negligible and in the midst of vacant lots and empty stores. It backs up on the tracks of the Pennsylvania Railroad (R. 418a-420a).

The Erlanger was never a successful theatre. It was closed more than it was open (See Exhibit P-45; R. 1142a; R. 456a). From 1932 to 1940, it was closed 329 weeks out of 468. It was never open during the summer months. It alternated between stage shows and motion pictures; but the only extensive use of the theatre for motion pictures occurred during the 1929-1930 season when RKO—which had a dispute with Warners (R. 421a)—leased it for 11 months and exhibited its own pictures there; but RKO abandoned it at the end of 9 months (R. 105a). With this exception, only 16 motion pictures were exhibited in the theatre from 1927 to 1940, and of these, 4 were exhibited on a road show basis, which is entirely different from the regular first run of motion pictures. Loew's, Paramount and Universal never exhibited a picture—on any basis—there. Until the respondent leased it, no one contended that it was a regular first run motion picture theatre. In 1931, while Mr. Goldman was Warners' general manager in Philadelphia, the Erlanger was abandoned by its owners, of which Warners was one (R. 1143a, 420a, 421a).

In the summer of 1940, William Goldman learned that a dispute was brewing between Paramount and Warners, which might afford him an opportunity to exhibit Paramount's product on first run in Philadelphia. With this object in view, he negotiated with the trust company which had taken the Erlanger over for default on the mortgage, and verbally agreed to lease the theatre. He learned before executing the lease (See Request No. 8, affirmed, R.

944a, and Request No. 44, affirmed, R. 963a) that the dispute between Paramount and Warners had been adjusted, and that Paramount would continue to exhibit its pictures on first run in Warner theatres. Nevertheless, he took the lease for a period of 10 years. The lease provided for the payment by the plaintiff of a minimum rental of $12,000 per annum, with a participation by the owner in the profits, if any, which plaintiff might derive from the operation of the theatre (R. 344a; Exhibit P-1, R. 1015a, R. 446a).

Shortly after plaintiff executed the lease, it wrote individual letters to certain of the distributors (R. 1033a; 1052a; 1068a; 1079a; 1086a; 1106a) notifying them that in the fall of 1941, it would be prepared to exhibit Type A motion pictures first run in the Erlanger at the same admission prices which Warners was charging in its best theatres. None of the distributors evinced an interest in using the Erlanger as its outlet for the first run exhibition of its pictures. Goldman later made separate offers to each of 3 of the distributors (RKO, R. 1041a; Universal, 1081a; Paramount, 1107a) in which he offered to pay 65% of the gross receipts as the license fee for pictures.[1] This was considerably more in percentage than the normal percentage paid for the license of motion pictures (R. 426a-428a).[2] None of the 3 distributors accepted the offer.

As already related, Warners built the Mastbaum Theatre in 1929. Exhibit P-47 (R. 1157a, 472a) indicates

[1] After suit was brought, respondent—on April 24, 1943—made a similar offer to Twentieth Century-Fox (R. 1061a).

[2] On cross-examination, Goldman admitted that he had offered 65% "to get pictures"; that anybody who paid 70% of the gross receipts for pictures could not operate profitably; and that the usual percentage was 35 or 40 (R. 426a-428a). Of course, whether 65% of the gross receipts would yield a higher rental to any distributor would depend on the relative size and drawing power of a particular Warner theatre.

that the Mastbaum operated at a profit during 35 weeks in 1929, and during 1930 and 1931. It closed in 1932 (R. 222a; 419a), and was not regularly operated again until the fall of 1942. During this period, Warner's losses in carrying the Mastbaum ran from $172,000 per annum to $364,000 per annum. In 1942, due to the increase in business occasioned by the war (Request No. 22; R. 948a) Warners reopened the Mastbaum, and it operated at a profit.

On the eve of the trial, respondent had submitted interrogatories to all of petitioners (R. 38a; 64a; 93a; 110a; 131a; 183a; 196a; 209a; 242a; 256a). They had replied (R. 40a; 66a; 95a; 113a; 133a; 185a; 198a; 212a; 244a; 258a). Some of their answers were offered in evidence (R. 280a-340a). Among other things, these answers disclosed that all of the Type A pictures produced by petitioners received a satisfactory play-off in Philadelphia during the period involved in the litigation (See R. 53a-59a; 82a-83a; 106a-107a; 130-3a-130-5a; 139a-140a; 225a-240a; 252a-253a; 265a-270a).

One of the interrogatories (See No. 21, R. 39a) asked the distributor defendants whether there was any reason why they should not contract with respondent for the exhibition first run of their pictures in the Erlanger. Petitioners, in somewhat different language, replied that it would not be to their economic advantage to exhibit their pictures first run in the Erlanger (R. 48a; 84a; 108a; 129a; 141a; 205a; 250a; 263a).

At the trial, Goldman was the only witness. He related his efforts to license motion pictures from the distributors, and identified certain exhibits which were put in evidence (See R. 343a-445a).

There was no evidence whatever indicating any consultation among the distributors, or that any distributor was influenced in its declination to license its pictures for first run exhibition at the Erlanger by what any other distributor thought or did.

That was respondent's case.

Counsel for petitioners were unanimously of the opinion that respondent had not made out a prima facie case. Accordingly, petitioners presented no evidence.

Requests for findings and conclusions were presented by all parties to the trial judge (R. 931a-974a). He affirmed the following requests made by Warners:

"11. There is no evidence from which a factual inference may be drawn that, when plaintiff leased the Erlanger there was a public need for another first run motion picture theatre in Philadelphia, or that the existing first run motion picture theatres did not adequately serve the needs of the public." (R. 945a)

"19. There is no evidence from which a factual inference can be drawn that the Erlanger is superior to the Aldine, Boyd, Earle, Fox, Mastbaum, Stanley or Stanton Theatres in respect of equipment or appointments." (R. 947a)

"20. The location of the Aldine, Boyd, Earle, Fox, Mastbaum, Stanley and Stanton Theatres is superior to that of the Erlanger. The Erlanger is located on the north side of Market Street at 21st Street, a block further west than the Mastbaum, which is located on the north side of Market Street at 20th Street. Between the Mastbaum and the Erlanger is a commercial building with vacant lots. The railroad abutment is behind the north side of Market Street. Pedestrian traffic on the north side of Market Street is 'practically negligible'." (R. 947a)

"24. There is no evidence from which a factual inference may be drawn that the Stanley Theatres have not accorded adequate playing time to all of the Tyr pictures of the defendant distributors." (R. 94[illegible]

"25. There is no evidence from which a factual inference may be drawn that the Stanley Company Theatres have not paid satisfactory financial returns to each defendant distributor for its Type A pictures." (R. 948a)

"26. There is no evidence from which a factual inference may be drawn that there is more than a sufficient number of Type A pictures distributed by the defendant distributors to satisfy the reasonable requirement of the Stanley Theatres." (R. 949a)

"27. There is no evidence from which a factual inference may be drawn that the Stanley Theatres, or any of them, have exhibited more Type A pictures than reasonably required or that there were licensed to or exhibited in them, or any of them, any Type A pictures in excess of reasonable requirements." (R. 949a)

"28. Each defendant distributor separately decided that it was more advantageous from a business standpoint to license its pictures for first run exhibition in the Stanley Theatres." (R. 949a)

The trial judge also affirmed the following requests made by the distributors:

"24. Between the date upon which the plaintiff acquired the Erlanger Theatre and the date of the institution of this suit, none of these defendants changed its policy or its course of conduct in the licensing of its feature pictures first run in Philadelphia." (R. 959a)

"28. No evidence was adduced showing that there was any agreement or understanding, express or implied, among these defendants (a) to license the first run of their pictures only to the Stanley Company, (b) to refrain from licensing their pictures to the plaintiff, or (c) to refrain from establishing in Philadelphia their own independent outlets for the first-run exhibition of their pictures." (R. 959a)

"29. Each of these defendants acted independently in licensing its Type A feature pictures for first-run showing in Philadelphia." (R. 959a)

"30. No evidence was adduced showing that the exhibition of these defendants' pictures for first-run exhibition at the Erlanger Theatre would have been more advantageous to any of these defendants than the exhibition thereof at the theatres of the Stanley Company." (959a)

The trial judge specifically *refused* to affirm inter alia the following requests made by the respondent:

"21. Plaintiff leased the Erlanger theatre believing in good faith that it would be able to obtain from some or all of the distributor defendants a sufficient number of pictures to make possible the profitable operation of said theatre." (R. 937a)

"32. Each and every distributor defendant knew that its refusal to lease any pictures for exhibition at plaintiff's theatre, coupled with a similar refusal by all the other distributor defendants, would necessarily result in the creation and perpetuation of an illegal monopoly of the business of exhibiting first run motion pictures in Philadelphia by the Stanley Company of America, Inc." (R. 938a)

"33. The Stanley Company of America, Inc., has intentionally attempted to monopolize, and has in fact monopolized, the business of exhibiting first run feature motion pictures in Philadelphia by suppressing competition." (R. 938a)

"34. The distributor defendants have intentionally aided Stanley Company of America, Inc., in monopolizing the business of exhibiting first run feature motion pictures in Philadelphia by suppressing competition." (R. 938a)

"35. The maintenance of said monopoly is made possible by intentional cooperation between Stanley Company of America, Inc., and the distributor defendants, the *quid pro quo* being the maintenance of similar monopolies by other defendants in other cities of the United States." (R. 938a)

The trial judge also explicitly refused to affirm the respondent's requests for conclusions, as follows:

"3. The failure of the defendants to call as witnesses any of the officers who had authority to act for the defendants and who were in a position to know whether they had acted in pursuance of agreement is persuasive that their testimony, if given, would have been unfavorable to defendants." (R. 940a)

"4. Since the proofs introduced by plaintiff in this case supported the inference of concert among the defendants, the burden rested on defendants of going forward with the evidence to explain away or contradict it." (R. 941a)

"5. An unlawful conspiracy in violation of the Sherman Anti-Trust Act may be formed without simultaneous action or agreement on the part of the conspirators." (R. 941a)

"6. Participation by competitors, without previous agreement, in a system of doing business the necessary consequence of which is restraint of interstate commerce is sufficient to establish an unlawful conspiracy under the Sherman Anti-Trust Act." (R. 941a)

In doing so, he said:

"COMMENT:

"Requests Nos. 3, 4, 5 and 6 have to do with the burden of proof and inferences to be drawn from the failure to call witnesses. Obviously they are based

upon the opinion of the Supreme Court in the Interstate Circuit, Inc., v. United States, 306 U. S. 208. In that case the plaintiff presented a case which logically required answer and the inferences to be drawn from the failure of the defendants to call witnesses was justified by the state of the record. That is not the situation in the present case. In Schad v. 20th Century-Fox Film Corp., 136 F. (2d) 991, the Circuit Court of Appeals for the Third Circuit sustained a dismissal in a case in which the defendant produced no evidence whatever." (R. 941a)

Judgment was entered for the petitioners.

However, respondent had requested the trial judge to find as follows:

"19. With respect to size, location, appointments, management, reputation and all other respects, the Erlanger theatre is suitable for profitable exhibition of first-class feature motion pictures on first run in competition with the theatres operated by Stanley Company of America, Inc., in Philadelphia." (R. 936a)

"22. After leasing the Erlanger theatre plaintiff repeatedly requested the distributor defendants to lease feature pictures for first run exhibition therein, and plaintiff in good faith offered to pay the defendants higher prices for pictures than the prices said defendants were receiving from Stanley Company of America, Inc." (R. 936a)

"30. The distributor defendants have refused to lease pictures for exhibition at the Erlanger theatre but solely because that theatre was not under the control of Stanley Company of America, Inc., and if said theatre had been under the control of the Stanley Company of America, Inc., the distributor defendants would

have leased pictures for exhibition therein at all times since November 9, 1940." (R. 937a)

"31. Each and every distributor defendant as well as Vitagraph, Inc., knew that every other distributor defendant was leasing its feature pictures for first run exhibition in Philadelphia at the theatres operated by Stanley Company of America, Inc., to the exclusion of plaintiff's theatre." (R. 938a)

Petitioners in their briefs protested that no evidence whatever in the Record justified the statement in Request No. 19 that with respect to location and reputation the Erlanger is suitable for profitable exhibition of motion pictures in competition with the Warner theatres, or the statement in Request No. 22 that the plaintiff had offered higher prices for pictures in good faith, than the prices the distributor defendants were receiving from Warners, or any part of Requests Nos. 30 and 31.

Notwithstanding petitioners' objections and the complete absence in the Record of anything justifying these statements and requests, the trial judge affirmed them, regardless of his inconsistent findings which have been previously quoted on pages 8 to 11.

On appeal to the Circuit Court of Appeals, that Court ignored all of the trial judge's findings to the effect that petitioners had acted independently in refusing to license their pictures to the respondent for first run exhibition at the Erlanger; that they had not in any way changed their pre-existing methods of doing business; that the location of the Erlanger was inferior to that of the Warner theatres; that there was no evidence justifying inferences of overbuying or dissipation of product by Warners; and that there was no evidence of an agreement or understanding, express or implied, that the distributors would license their pictures for first run only to Warners, or that they would not license them to respondent.

Resting its decision on the trial judge's affirmance of respondent's requests for findings Nos. 19, 22, 30 and 31, certain statements of the trial judge which could not possibly have been intended as findings, and certain purported statements of fact which the trial judge had expressly refused to find (doubtless because there was no evidence to support them), it held that in view of these findings and statements, the principle of the **Interstate** Case applied and a conspiracy might be inferred because of petitioners' unanimity of action in not presenting any evidence (R. 989a).

The trial court was reversed, and the case was remanded for a hearing on damages.

Petitioners presented a petition for rehearing in which they specifically requested that—if a reargument were refused—they be permitted at the hearing on damages also to present their evidence negativing conspiracy. The petition was denied *in toto*.

There being no final judgment, petitioners had no alternative but to proceed with the damage hearings. Those hearings were held, beginning on May 6, 1946 (R. 473a, et seq.).

Respondent presented no evidence, except figures which were in the Record at the first trial (although rearranged and reassembled in Exhibit P-48, R. 1159a; R. 479a), and testimony by its auditor relating to respondent's actual out-of-pocket expenses in paying rent and maintaining the Erlanger during the period beginning in the fall of 1941 and ending with the date of the filing of the complaint,—December 7, 1942 (R. 483a-543a). They amounted to $25,007.34 (R. 485a).

Contrary to **Bigelow, et al. v. RKO Radio Pictures, Inc. et al.**, 327 U. S. 251 (1946), no evidence whatever was presented by respondent to show that the Erlanger had made profits during all or any part of the prior 15 years of its his-

tory, nor indicating that in anyone's opinion the Erlanger Theatre would have earned any profits during the period in question, much less grossed the average amount of the gross receipts of the 5 best Warner first run theatres; yet respondent asked the trial judge to find that the Erlanger's gross receipts would have been the average gross receipts of the 5 best Warner houses. It relied exclusively on **Bigelow, et al. v. RKO Radio Pictures, Inc., et al.**, 327 U. S. 251 (1946).

Again, counsel for petitioners were of the opinion that the plaintiff had not proven damages; but in view of the Circuit Court's novel interpretation of the **Interstate** Case in its first opinion, they presented answering evidence.

For Warners, a Philadelphia real estate expert (R. 560a, et seq.) and a Philadelphia independent motion picture exhibitor (R. 585a, et seq.) testified; and each of the distributors placed on the witness stand its top sales executive (R. 761a-913a).

These witnesses testified that the location of the Erlanger Theatre was inferior to that of any of the Warner first run theatres; that the Erlanger's history and lack of reputation rendered it undesirable as a first run motion picture house; that the theatre was not air conditioned, and therefore could not be utilized in the summer months; and that as a result of these unfavorable factors, the gross receipts from the exhibition of any picture at the Erlanger would be substantially less than the gross receipts if the same picture were exhibited at one of the better located established Warner theatres. Estimates of the percentage by which the Erlanger's gross receipts would be less than those of the Warner theatres varied from 33 1/3% to 65% (R. 855a-859a; 890a-891a; 815a; 787a; 837a; 883a).

It was again brought out that the distributors' revenue from first run exhibitions of Grade A pictures is on a percentage basis (R. 787a; 812a; 839a) so that, assuming

the correctness of the factors mentioned in the preceding paragraph, any distributor would lose money by exhibiting a picture on first run at the Erlanger rather than in one of the more desirable Warner theatres.

And it was shown (R. 569a; 1166a-1172a) that Warners had paid $546,730.71 to be relieved of its 1/3 interest in the Erlanger and the mortgage obligation thereon.

Respondent presented no rebuttal evidence. Apparently not even Mr. Goldman was willing to say, subject to cross-examination, that in his opinion the Erlanger would gross the average of the 5 best Warner theatres, and could be profitably operated.

The trial court rejected the respondent's theory that it was entitled to an assumption that the Erlanger would gross as much as the average of the 5 best Warner theatres; and also rejected the testimony of the distributors' witnesses that the Erlanger would gross from 1/3 to 65% less than any of the Warner first run houses (R. 1010a). He made special findings modifying his findings at the previous trial as follows (R. 1010a):

> 1. That the location of the Erlanger is somewhat less favorable than that of the Mastbaum and a great deal less favorable than that of any of the other Warner theatres;
>
> 2. That the Erlanger had not been a first run theatre within recent times, and had no established reputation with the public, or good will; and
>
> 3. That lack of air conditioning equipment was a deficiency.

The trial judge also found that the Erlanger had not, since it was built, been operated as a motion picture theatre at all, except for a period of about nine months, occurring more than ten years before respondent leased it (R. 1004a).

Notwithstanding these findings, the court assessed damages, for the 15-month period, at $125,000 (R. 1001a). Judgment was entered in treble this amount, plus a $60,000 attorneys' fee. The Court also entered an injunction requiring the defendants, before licensing their pictures to any of the other defendants, to give to plaintiff an equal opportunity to negotiate for the pictures for first run exhibition at any of the plaintiff's theatres (R. 1012a-1014a).

Meanwhile (See R. 1305 et seq.) respondent had purchased two theatres in downtown Philadelphia formerly leased by Warners—Keiths and the Karlton—and had converted a centrally located restaurant into a motion picture house which it calls the "Goldman." Respondent encountered no difficulty in licensing Type A pictures for first run exhibition at the Goldman which, although smaller than the Warner first run theatres, has a good location. It is on 15th Street, less than a square away from Broad Street Station.

Keiths and the Karlton had been operated by Warners as second run theatres. When the distributors declined to regard them as first run theatres upon the respondent's acquisition of them, it brought a second suit which is pending untried in the District Court.

The injunction entered by the District Court does not relate only to the Erlanger, which was the subject matter of this suit, but is broad enough to cover Keiths and the Karlton.

Petitioners again appealed to the Circuit Court. The appeal was filed on December 30, 1946 (R. 7a).

Although the Circuit Court's first opinion was handed down on August 2, 1945 (R. 989a), and the final judgment and decree was entered on December 19, 1946 (R. 1012a), after which petitioners were obliged to—and did—comply with the injunction, respondent made no move whatever to

negotiate for any picture for first run exhibition at the Erlanger, but instead bid exclusively for the exhibition of pictures first run at the Goldman, Keiths and the Karlton.

In all, 63 pictures were offered to the respondent between December 19, 1946, and April 25, 1947 (R. 1213a). The respondent rejected entirely 43 of these pictures. It bid for none for the Erlanger Theatre; for 4 of the 63 pictures for the Goldman; for 8 of them for the Karlton; and for 4 of them for Keiths. And it licensed pictures continuously for first run at the Goldman and the Karlton. But the Erlanger was not opened.

Alleging that by its conduct in refusing to bid for pictures for the Erlanger when available, respondent itself had recognized the unsuitability of the Erlanger as a first run motion picture house, the distributors, on April 29, 1947, filed a petition with the Circuit Court of Appeals for leave to file a bill of review in the District Court (R. 1203a). They supported their petition by affidavits of all their sales executives (R. 1228a-1300a). A rule to show cause and a stay were granted (R. 1225a).

The petition was argued before the Circuit Court, consisting of Judges Biggs, McLaughlin and O'Connell, on May 5, 1947. On May 7, 1947, the Court ordered a reargument before the same judges who had heard the original appeal (R. 1226a). The case was reargued on June 3, 1947, and on August 11, 1947 the Court handed down an opinion to the effect that the bill of review was filed too late and that in any event the facts brought to the Court's attention were immaterial (R. 1334).

The second appeal was argued on November, 1947; and on January 6, 1948 a *per curiam* opinion was rendered (R. 1342) affirming the judgment of the District Court on the authority of **Interstate Circuit, Inc. v. The United States**, 306 U. S. 208 (1939), and **Bigelow, et al. v. RKO Radio Pictures, Inc., et al.**, 327 U. S. 251 (1946).

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the judgment here in question under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937, 28 U. S. C. A. 347 (a).

The statutes involved are the Sherman Act, 26 Stat. 209, 15 U. S. C. A. 1-7, and the Clayton Act, 38 Stat. 731, 15 U. S. C. A. 12-27.

The jurisdiction of this Court is invoked for the purpose of determining the interpretation and application of Sections 1 and 2 of the Sherman Act, *supra,* and Section 15 of the Clayton Act, *supra.*

The final judgment of the United States Circuit Court of Appeals for the Third Circuit, review of which is sought by this petition, was entered January 6, 1948 (R. 1343). Interlocutory orders were entered by the Circuit Court on August 2, 1945 (R. 989a) and on August 11, 1947 (R. 1334), both of which this Court is asked to review.

QUESTIONS PRESENTED.

1. Is the mere fact that one company operated all the first run motion picture theatres in Philadelphia, there being no proof of any predatory or coercive or other unlawful practices in the acquisition of any theatre, *per se* a violation of Section 2 of the Sherman Act?

2. The respondent having offered no evidence as to the earning capability of its theatre did the District Court properly grant damages predicated upon lost profits, estimated solely on the grosses of the Warner petitioners' theatres? (This question was left undecided by this Court in **Bigelow, et al. v. RKO Radio Pictures, Inc., et al.,** 327 U. S. 251).

3. May an award of damages be made under the Sherman Act in the absence of any proof that plaintiff's theatre, at any time in its 13-year history (during all but the last 15

months of which there was no contention that any restraint operated on the theatre) operated at a profit, and merely on proof that other theatres at different locations and with different histories, earned a profit?

4. Did the Circuit Court err in holding that **Bigelow, et al. v. RKO Radio Pictures, Inc., et al.**, 327 U. S. 251, was applicable to the instant case on the rule of damages to be applied, and was not the holding in that case misapplied to the facts presented by the Record below?

5. Did the Circuit Court err in holding that **Interstate Circuit, Inc. v. The United States**, 306 U. S. 208 (1939) was applicable to the instant case on the question whether a conspiracy should have been inferred on the facts presented by the Record below, and was not the holding in that case misapplied?

6. May a Circuit Court ignore findings of fact of the trial court negativing a conspiracy, reverse the judgment of the trial court upon other findings which had no support in the evidence whatever, without considering the question whether such findings had any support, and infer conspiracy from the fact that the appellees presented no evidence whatever because of their firm belief that a *prima facie* case had not been made out by appellant?

7. Under Rule 52 of the Rules of Civil Procedure, may a Circuit Court set aside findings of fact made by the trial court with ample support in the Record, and make findings which the trial court refused to make for which there is a complete lack of supporting evidence?

8. Will a conspiracy be inferred against distributors of motion pictures on a mere showing that one exhibitor operated all of the first run theatres in Philadelphia, and that when the plaintiff leased an unsuccessful, closed theatre at an undesirable location, no distributor of motion pictures was willing to license its pictures for first run in such theatre?

9. Will a conspiracy be inferred against the distributors of motion pictures under the circumstances mentioned in the preceding question because none of them presented any evidence?

10. Should not the Circuit Court have remanded the case to the District Court to afford the petitioners an opportunity to supply the proof negativing conspiracy, in view of the Circuit Court's reversal of the judgment of the District Court dismissing the complaint on the ground that on the respondent's evidence no conspiracy had been established, the Circuit Court having inferred a conspiracy from the petitioners' failure to call witnesses? Under the circumstances of this case, was not the Circuit Court's failure to remand for such purposes an abuse of discretion?

11. Did the Circuit Court err in refusing to permit the petitioners to file a bill of review in the District Court when it appeared that, although petitioners were complying with a mandatory injunction requiring them to make their Type A pictures available for first run at respondent's theatre, respondent for a period of approximately four months made no effort whatever to open its theatre, thereby indicating by its conduct that the contention of petitioners was correct that respondent's theatre was not suitable for use as a regular first run motion picture theatre?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The discretionary power to grant a writ of certiorari is invoked upon the following grounds in accordance with Rule 38 (5) of this Court:

1. The decision of the Circuit Court of Appeals in holding that the operation by Warners of all the first run motion picture theatres in Philadelphia is *per se* a violation of Section 2 of the Sherman Act is in direct conflict with the decision of the Special Expediting Court in the Southern

District of New York in **United States v. Paramount Pictures, Inc., et al.**, 66 F. Supp. 323 (D. C. S. D., N. Y., 1946) which held that ownership by a single defendant of all first run theatres in a city does not alone constitute violation of the Sherman Act. That case is now pending before this Court.

2. The decision of the Circuit Court on damages is in direct conflict with the decisions of the Circuit Courts of the Second and Eighth Circuits in **Baush Mach. Tool Co. v. Aluminum Co. of America**, 79 F. (2d) 217, 227 (C. C. A. 2nd, 1935), and **Central Coal & Coke Co., et al. v. Hartman** 111 Fed. 96 (C. C. A. 8th, 1901).

3. The Circuit Court in its opinion applied to the Sherman and Clayton Acts, a rule of damages which is not warranted by, and which is in conflict with, the decisions of this Court in **Bigelow v. RKO Radio Pictures, Inc.**, 327 U. S. 251 (1946); **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U. S. 359 (1927); and **Story Parchment Co. v. Paterson Parchment Paper Co.**, 282 U. S. 555 (1931).

It affirmed the trial court, solely on authority of the **Bigelow** Case, in speculating as to the probable profits of the Erlanger, if it had operated as a first run motion picture theatre, without any evidence that the theatre could have produced an amount of business comparable to that of any of the Warner theatres, and without presenting evidence of the financial results of the Erlanger's fifteen years of operations prior to the alleged conspiracy, but predicated solely upon the average gross receipts of five selected Warner theatres.

Its decision is, we submit, in conflict with all the applicable decisions of this Court.

4. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

On the evidence presented to the District Court, that Court was unable to do otherwise than conclude that re-

spondent had failed to prove its charge of conspiracy against petitioners. However, the trial judge, without any supporting evidence whatever, affirmed certain requests for findings of fact presented to him by respondent. Petitioners on three occasions—the first appeal, the bill of review proceeding, and the final appeal—called the attention of the Circuit Court of Appeals to the erroneous affirmance of these requests. At no time did respondent present to the Circuit Court anything justifying their affirmance. Nevertheless, the Circuit Court failed to consider petitioners' challenge of these findings, but instead, relying upon them, upon certain statements of the trial judge and of its own which were wholly unsupported by the evidence, and upon the fact that petitioners had not offered any evidence, drew an inference of conspiracy against the petitioners. The result is that petitioners stand convicted of conspiracy because they did not present evidence to refute non-existent facts.

5. The Circuit Court cited as authority for its procedure, this Court's decision in **Interstate Circuit, Inc. v. The United States**, 306 U. S. 208 (1939). Yet that case on its facts is in direct conflict with the present case, and its holding by no means justifies the use which the Circuit Court of Appeals made of it. Furthermore, the Third Circuit had decided, only a few months before the trial of the instant case, where plaintiff's evidence did not require explanation or rebuttal that the **Interstate** decision had no application. **Schad v. Twentieth Century-Fox Film Corporation**, et al., 136 F. (2d) 991 (1943).

In the **Interstate** Case, circumstances were presented by plaintiff's evidence which required explanation. The series of agreements which the Interstate Circuit had demanded (and which involved radical departures from the defendants' pre-existing policies) had in fact been made. And the defendants, instead of calling their executive officers who were in a position to present an explanation, called only subordinate employes who were not in a position at first hand to explain the proven circumstances, or to deny

that the circumstances were the result of conspiracy. In the present case, respondent produced nothing requiring explanation, and the petitioners accordingly presented no manded (and which involved radical departures from the deevidence.

Between the **Schad** Case and the present case, there is a complete contrariety of interpretation of the **Interstate** Case in the Third Circuit Court of Appeals; and the instant decision is in direct conflict with the decision in the **Schad** Case.

6. The decision of the Circuit Court of Appeals is in conflict with the well-established rule of this Court (**Pennsylvania Railroad Co. v. Chamberlain**, 288 U. S. 333 (1933), at 339), recognized in prior decisions of the Circuit Court of Appeals for the Third Circuit (**Schad v. Twentieth Century-Fox Film Corporation**, 136 F. (2d) 991 (1943) at 996; **J. B. Lippincott Co. v. Federal Trade Commission**, 137 F. (2d) 490 (1943) at 494), that where the evidence tends equally to sustain either of two inconsistent inferences, neither inference can be said to be established. In the instant case, proof by respondent that none of petitioners was willing to license its pictures for exhibition in a theatre which, throughout its history, had never been successful and was not an established motion picture house, was just as capable of sustaining an inference that each of petitioners believed that the use of respondent's theatre would be economically disadvantageous, as the inference that the only reason for each petitioner's refusal to license its pictures for first run at the undesirable theatre was a conspiracy between all of petitioners.

7. It was an abuse of discretion for the Circuit Court to refuse to permit the petitioners to present their evidence negativing conspiracy when they remanded the case to the district court for hearing on the question of damages.

Unless litigation is a mere game, and unless it is not the object of an appellate court to achieve substantial justice, petitioners should not be made to suffer because in

reliance upon the Circuit Court's prior decision in **Schad v. Twentieth Century-Fox Film Corporation**, 136 F. (2d) 991 (1943), they did not present their evidence. Not only petitioners but the trial judge as well (R. 987a) regarded the **Schad** Case's interpretation of this Court's decision in the **Interstate** Case as controlling. Petitioners were completely taken by surprise when the Circuit Court rejected its prior interpretation and applied a new one in this case. Justice and fair play required that petitioners be afforded an opportunity to present their evidence.

8. There are now pending in the federal courts upwards of 50 anti-trust cases in which one or more of these petitioners is involved. It is of vital importance, not only to them but in the public interest, that the questions presented by this petition should be settled by this Court so as to avoid protracted litigation in many courts involving the interpretation of the **Interstate** and **Bigelow** Cases, the meaning of which has been extended in this case to situations to which this Court probably never intended either case to apply.

9. This decision, if it stands, will bring down on the motion picture industry a flood of litigation which it may not be able to survive.

In the **Bigelow** Case, plaintiff was the operator of an established theatre. Here, the respondent's theatre was an established failure. It had never been successfully operated as a legitimate theatre, for which it was originally built in 1927, nor had it ever been operated as a successful motion picture theatre, for which it was used at rare intervals during the 13 years of its existence prior to respondent's lease.

The learned trial judge speculated that for the 15 months of the damage period in the instant case, respondent would have made profits in the amount of $125,000. This figure, multiplied by 3, amounts to $375,000, which, with the $60,000 counsel fee, interest and costs, adds up to something in the neighborhood of $500,000.

Respondent is now proceeding with its other pending action covering the 4-year period immediately following the damage period of the present suit, for which it demands $8,400,000 in damages. The landlord—the trust company which made the lease—has pending another action to recover damages for alleged loss of rent during the 15-month period, based upon the percentage provisions of the fantastic lease which it made with respondent, namely, $12,000 a year base rental, plus a percentage of the theatre's profits.

Accordingly, this theatre, which cost $2,500,000 to build in 1927,—a legitimate theatre which was closed more than it was open,—a theatre which was so undesirable that Warners paid more than $500,000 to the landlord to get off the mortgage,—may be used by this respondent as an instrument to take away from petitioners many millions of dollars for a period of time during which the theatre occupied its usual and customary position in the entertainment life in Philadelphia, to wit, a closed theatre.

It is this type of litigation which has encouraged plaintiffs all over the country to harass these petitioners and other parties with claims of damages to business or property, with no obligation to prove any actual damage, but using paid experts to testify to some theory that the plaintiffs would have made more money than they actually made if they had played other pictures, or pictures on a different run, or pictures which played in a competitor's theatre.

In the **Bigelow** Case, this Court has sustained an award under circumstances which, we submit, represent the ultimate relaxation of the ordinary rule of damages. There, the Court sustained damages upon a showing of the profits of a profitable theatre as compared with another theatre which was the beneficiary of a conspiracy. Here, respondent would be allowed to recover for the non-operation of an established failure—which it can be fairly inferred from the Record never made a profit—a sum representing many times the original cost of the theatre, thus converting a theatre which earned no profits in a competitive market into a bonanza through the instrumentality of an inferred con-

spiracy based solely upon the refusals of these petitioners —severally—to decline to experiment with their pictures in a theatre which had never been successful.

We repeat, this decision, if unreversed, may well spell the ruin of the motion picture industry.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a transcript of the Record and proceedings of the said Circuit Court of Appeals had in the case numbered in its docket, Appeal No. 9324, and entitled in the manner set forth in this petition, and that the judgment of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioners have such other and further relief as to this Honorable Court may seem just.

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FILE COPY

IN THE

Supreme Court of the United States

No. 611

October Term, 1947.

LOEW'S INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, STANLEY COMPANY OF AMERICA, INC., UNIVERSAL FILM EXCHANGES, INC. and UNITED ARTISTS CORPORATION,

Petitioners,

v.

WILLIAM GOLDMAN THEATRES, INC.,

Respondent.

BRIEF OF LOEW'S INCORPORATED, ET AL. (Distributors) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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TABLE OF AUTHORITIES CITED.

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Petitioners,

v.

WILLIAM GOLDMAN THEATRES, INC.,

Respondent.

BRIEF OF LOEW'S INCORPORATED, ET AL. (DISTRIBUTORS) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.
OPINIONS BELOW.

The opinion of the Circuit Court of Appeals from which this appeal is taken appears at R. 1342. It has not yet been reported. The prior opinion of the Circuit Court of Appeals dealing with liability is reported at 150 F. (2d) 738 (1945).

The opinion of the Circuit Court of Appeals in the bill of review proceeding is reported at 163 F. (2d) 241 (1947).

The two opinions of Judge Kirkpatrick of the District Court are reported, respectively, at 54 F. Supp. 1011 (1944) and 69 F. Supp. 103 (1946).

II.

JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937, 28 U. S. C. A. 347 (a).

(b) The questions presented arise under the Sherman Act, 26 Stat. 209, 15 U. S. C. A. 1-7, and the Clayton Act, 38 Stat. 731, 15 U. S. C. A. 12-27.

(c) The judgment of the United States Circuit Court of Appeals for the Third Circuit which petitioners seek to have reviewed was dated January 6, 1948, and filed the same day (R. 1343). Interlocutory judgments were entered by the Circuit Court on August 2, 1945 (R. 989a) and on August 11, 1947 (R. 1334), both of which this Court is asked to review.

III.

STATEMENT OF THE CASE.

A sufficiently full statement of the case has been given in the petition under the heading "Summary Statement of the Matter Involved", and, in the interest of brevity, it is not repeated here.

IV.

SPECIFICATIONS OF ERROR.

(a) The Circuit Court of Appeals erred in failing to review statements and affirmances of requests by the trial judge which petitioners aver cannot be sustained by any evidence whatever, and in ignoring other findings of fact which the trial judge made in accordance with the evidence.

(b) The Circuit Court of Appeals erred in basing its reversal of the judgment of the District Court on liability, on affirmances and statements by the trial judge which had no evidence whatever in the Record to support them.

(c) The Circuit Court of Appeals erred in holding that **Interstate Circuit, Inc. v. The United States**, 306 U. S. 208 (1939) is authority for inferring a conspiracy against petitioners, because they did not present any evidence, respondent not having presented a *prima facie* case.

(d) The Circuit Court of Appeals erred in holding that the ownership or operation by one of petitioners of all the first run motion picture houses in Philadelphia was *per se* a violation of Section 2 of the Sherman Act.

(e) The Circuit Court of Appeals erred in holding that **Bigelow, et al. v. RKO Radio Pictures, Inc., et al.**, 327 U. S. 251 (1946) is authority for awarding damages to the respondent in the absence of any proof that its theatre had ever operated profitably, or could have been operated profitably if the petitioners had licensed their respective films to it for first run exhibition during the period involved in this case.

(f) The Circuit Court of Appeals erred in making statements inconsistent with or opposite to the findings of the trial judge, without indicating wherein or why the findings of the trial judge were unsupported by evidence.

(g) The Circuit Court of Appeals erred in holding petitioners guilty of a conspiracy "on the whole record", without showing in what respects or why the findings of the trial judge negativing a conspiracy were not supported by evidence.

(h) The Circuit Court of Appeals erred in refusing petitioners' application for leave to file a bill of review.

V.

ARGUMENT.

Unless the rules of law relating to burden of proof have no application in actions brought against the motion picture industry under the Sherman Act, the result in this case presents a grave miscarriage of justice.

The respondent corporation is wholly owned by Mr. William Goldman, formerly Warners' general manager in Philadelphia (R. 391a-392a). Mr. Goldman is an experienced motion picture man. He has spent his life in that industry (R. 386a-391a). When, on November 9, 1940, he caused his corporation to lease the Erlanger Theatre for ten years, he knew that no motion picture company executive in his right senses would constitute the Erlanger the first run outlet for his company's product in preference to the first run theatres operated by Warners.

The Erlanger was a white elephant with a black eye. For 13 years no one had been able to operate it successfully (Ex. P-45; R. 1142a; 456a). Its original owners—of whom Warners was one—permitted a Philadelphia trust company to take it over under the mortgage in 1931 (R. 1143a). Thereafter Warners paid more than $500,000 to be relieved of their mortgage liability (Ex. D-1, D-2, R. 1165a-1166a; 569a). The trust company was unable to find anyone who would pay a rental for the use of the theatre commensurate with its cost, which, according to Mr. Goldman, was $2,500,000 (Ex. P-20-A, R. 1033a; 446a). Apparently, it was so desperate for a tenant that it leased the theatre to the respondent for 10 years at a minimum rental of $12,000 a year—less than ½ of 1% of its cost (Ex. P-1-P-4, R. 1015a-1029a; 446a). Obviously, the theatre was a white elephant in the hands of its trust company owner.

That the theatre had a black eye appears from its history (Ex. P-45, R. 1142a; 456a). An analysis of this

history shows that of the 670 weeks during the period beginning with its opening and ending with the date of respondent's lease, the theatre was closed 371 weeks. It is not equipped with air conditioning, so that it was never open during the summer months (R. 1010a; 594a). During the year 1940—according to the history—it had been open for only 7 weeks during which two stage presentations and one motion picture were shown. Necessarily, a theatre with a record such as this lacked a good reputation.

When the respondent *made* its lease, it had no expectation of obtaining product from any of the motion picture distributors (R. 381a). The *idea* of making the lease was inspired by a prospective quarrel between Warners and Paramount; but before the lease was signed, Mr. Goldman knew that the dispute had been adjusted and that Paramount would continue to exhibit its pictures first run in the Warner theatres (R. 963a, 375a-381a).

There is in the Record not a scintilla of evidence showing that any other distributor even knew that respondent was thinking of leasing the Erlanger, much less gave it any encouragement.

Thus, respondent executed the lease as a gamble. Its investment was comparatively nil. It was a successful operator of motion picture theatres in Philadelphia and elsewhere in Pennsylvania (R. 392a-393a), so that the income tax situation meant that respondent would have a net investment in the theatre of a very few thousand dollars per annum. During the war years, this investment became minimal due to the excess profits tax situation.

That respondent desired to exhibit motion pictures on first run in Philadelphia is evident (R. 400a); but as an experienced motion picture man he knew that the Erlanger was not desirable for this purpose. It was "off location",

—not much, but just enough to account for the difference between a desirable and an undesirable first run theatre (R. 417a-420a; R. 560a; 575a). Respondent has, since the institution of this suit, entered the first run theatre business in Philadelphia through the erection by it of the Goldman Theatre in downtown Philadelphia—a theatre for which respondent has had no difficulty whatever in obtaining product (R. 1212a-1213a).

Accordingly, the net amount which respondent was obliged to pay to obtain the Erlanger lease so that it might institute an anti-trust suit on the chance that a court might *infer* conspiracy was a very small price to pay for the possible windfall which might result.

Respondent when it took the lease—although Mr. Goldman had been in the motion picture business for years—had no evidence of conspiracy. Accordingly, Mr. Goldman undertook to create evidence. He wrote letters and held conferences, but they were wholly unproductive. Each distributor said what Mr. Goldmen knew that it would say, namely, that it did not care to license its pictures for first run exhibition at the Erlanger (R. 353a-381a; Ex. P-20-P-27; R. 1033a-1102a).

After a two-year period during which Mr. Goldman conducted a fruitless search for evidence of conspiracy, respondent brought suit (R. 344a-345a, 1a).

At the trial, respondent was able to prove only that Warners operated all first run theatres in downtown Philadelphia, (Ex. P-36-37, R. 1130a-1132a; 452a-453a); that it had notified some of the distributors that it would like to license Type A pictures for first run exhibition at the Erlanger beginning in the Fall of 1941, (Ex. P-20-A, R. 1033a, 446a; Ex. P-21-A, R. 1052a, 446a; Ex. P-22-A, R. 1068a, 446a; Ex. P-24-A, R. 1079a, 446a; Ex. P-25-A, R. 1086a, 446a; Ex. P-27-A, R. 1102a, 446a); that it had offered

to four distributors an unusual percentage for specified groups of five pictures; (R. 427a, Ex. P-20-H, R. 1041a, 446a; Ex. P-21-H, R. 1061a, 446a; Ex. P-24-H, R. 1081a, 446a; Ex. P-27-H, R. 1107a, 446a) but that no distributor saw fit to license its pictures to respondent for exhibition at the Erlanger (R. 353a-375a; Ex. P-20-P-27, R. 1033a-1102a, 446a).

That was respondent's case.

If respondent can sustain its judgment in the amount of $375,000 for the fifteen-month period involved in this case, and, as it hopes, go on to recover $8,400,000 for the ensuing four years (R. 1308), the Sherman Act will have been utilized for respondent's unjust enrichment to a degree which, when the amount of its investment is considered, will be fantastic.

As stated in the petition (pp. 25-27), if this decision stands it will be a precedent which may well spell the ruin of the motion picture industry.

Respondent's Proof at the Trial Did Not Call for Any Explanation.

In our Statement of the Case in the Petition, we have outlined the proof presented by the respondent at the original trial of the case. It consisted of the following:

1. Proof of the history of Warners' acquisition of its first run theatres in Philadelphia. This proof indicated that only two of eight first run theatres had been acquired from competitors; and there was no proof, or allegation, of any coercive or other illegal practice in connection with the acquisition of any theatre. The Stanley Company of America was a pioneer in the exhibition of motion pictures in Philadelphia. Its chain of first run theatres was a natural growth. Nothing else could reasonably be inferred from anything contained in the Record (Ex. P-37, R. 1132a, 453a).

2. Evidence that the distributors from time to time licensed their pictures to the available first run theatres in Philadelphia (R. 75a, 104a, 120a, 139a, 222a-223a, 249a, 262a). It is common knowledge that prior to the entry of the consent decree in **United States v. Paramount**, 66 F. Supp. 323, 331 (D. C. S. D., N. Y. 1946) the practice was to license a distributor's entire product to a theatre or chain of theatres for one or more seasons. **United States v. Paramount**, *supra*, at p. 333. (See R. 72a.)

In Philadelphia, as Warners operated all the first run theatres, it was natural that the several distributors should follow their respective practices in making term license agreements. Thus, the Record shows that on September 25, 1939, Loew's contracted with Warners for the first run exhibition of its pictures during the 1939-40, 1940-41 and 1941-42 seasons. The contract was offered in evidence as Exhibit P-43 (R. 455a), but nothing in the contract is material to the issues in this case, and neither party asked to have it printed as part of the Record on appeal.

The only contracts between Warners and Paramount which were offered in evidence were a contract dated December 27, 1940, for one year (Ex. P-44 R. 456a, also not printed), and a contract dated September 14, 1943, for the 1943-44 season (R. 91a; 312a; 75a).

On August 28, 1940, RKO contracted for the licensing of its pictures to the Warner theatres first run during the 1940-41 season. This was the only RKO contract offered in evidence (Ex. P-38, R. 453a, also not printed).

On September 16, 1940, Columbia contracted with Warners to license its pictures first run in the Warner theatres for three seasons. This contract was offered in evidence (R. 145a-179a; 338a).

On July 28, 1936, Twentieth Century-Fox licensed its pictures for first run to Warners in conjunction with a lease of the Fox Theatre. The lease was for a term of three years (Ex. P-41, R. 455a, also not printed), and was extended by agreement dated July 31, 1939, for five years

more (Ex. P-40, R. 1135a, 445a). The license agreement is in evidence (R. 130-1a, 318a).

A series of contracts between United Artists and Warners (Ex. P-42, R. 455a, also not printed) was also introduced. Each contract related to the pictures of their particular producer, whose product was distributed by United Artists.

On September 15, 1941, Universal agreed to license its pictures for the seasons 1941-42, 1942-43 and 1943-44 to Warners, and this contract is in evidence (R. 254a, 249a, 332a).

These were the only contracts offered in evidence.

3. The respondent's lease of the Erlanger, including copies of the lease and supplemental agreements (Ex. P-1, 2, 3 and 4, R. 1015a-1030a, 446a); a series of photographs (Ex. P-5 to 19, R. 446a, not printed); and Mr. Goldman's testimony relating to the making of the lease (R. 375a-381a).

4. Mr. Goldman's testimony relating to his efforts to license pictures for the season beginning in the fall of 1941. This consisted of copies of correspondence between Mr. Goldman and representatives of the several distributors (Ex. P-20 to 27, R. 1033a-1102a, 446a) and Mr. Goldman's account of interviews which he had with the Philadelphia branch managers of some of the distributors (R. 353a-374a).

Mr. Goldman's letters contained many self-serving statements, and were received by the trial court only to establish that Mr. Goldman, for the respondent, had made demands for pictures (R. 448a). The net effect of all this testimony was that no distributor licensed any of its pictures to the respondent for exhibition first run at the Erlanger (R. 381a).

5. Mr. Goldman's testimony regarding Warners' Mastbaum Theatre. This theatre, according to Mr. Goldman, is the biggest thing of its kind in the country (R. 418a).

It was built in 1928 and operated for several years. It was closed while Mr. Goldman was Warners' manager. Except for a few spasmodic attempts to reopen it, it remained closed until the fall of 1942 (R. 419a), when the unusual volume of business due to the war caused Warners to reopen it. It is located one square nearer the business center than the Erlanger, and when it reopened, it operated profitably (R. 416a-419a; Ex. P. 47, R. 1145a, 472a).

6. Parts of petitioners' answers to interrogatories which demonstrated that petitioners' several branch managers in Philadelphia had no authority to make contracts for their respective principals (R. 40a; 68a; 99a; 115a; 135a; 219a; 249a; 258a); that all of the Type A pictures released by the petitioners during the period involved in this case were exhibited first run in Philadelphia in one of the Warner first run theatres for periods of two weeks or more (R. 53a-59a; 82a-83a; 106a-107a; 130-4a-130-5a; 138a-140a; 252a-253a; 265a-266a; 225a-239a); and that each of distributors was unwilling to license its pictures for first run exhibition at respondent's Erlanger Theatre for its own reason, although the reasons given were somewhat similar (R. 48a; 84a; 108a; 129a; 141a; 250a; 263a).

7. A statement of the income, expense and profit of the several Warner theatre during the relevant period (Ex. P-47, R. 1145a, 472a).

8. Some miscellaneous documents having no material importance (Ex. P-28-35, R. 1120a-1130a, 446a, 451a, 452a, and Ex. P-46, R. 457a, not printed).

We submit that, assuming the foregoing statement of the respondent's evidence to be correct, no one could spell out a conspiracy on the part of the distributors not to exhibit their respective pictures in the Erlanger Theatre.

It was to be expected that the trial judge, after considering this evidence, would have entered judgment for the petitioners.

However, in the course of his opinion and his rulings on respondent's requests for findings the trial judge—for some unaccountable reason—affirmed certain requests which had no evidence whatever to support them and made some equally unfounded statements of his own.

As these requests and these statements were the sole basis for the Circuit Court's reversal, we shall deal with them in detail.

The statement made by the trial judge which has been most quoted by the Circuit Court in its several opinions appears at R. 982a, as follows:

> "* * * Of course, the intent is patent—necessarily inferable from the contracts themselves—to exclude the plaintiff and all others except Warners from the first run business."

We have referred to the only contracts which were offered in evidence. They were contracts giving to Warners an exclusive license for the first run exhibition of a particular distributor's pictures for terms of one or more seasons. They were made at different times and on different bases. Nothing in any of the contracts warranted the trial judge's statement, as that statement was interpreted by the Circuit Court. Of course as each contract gave to Warners an exclusive license for the first run exhibition of particular pictures, the intent was patent that no one else should have the privilege of first run exhibition. The very term "first run exhibition" excludes the idea of more than one exhibitor. Nothing in the contracts was directed at the respondent or at any other exhibitor. When most of the contracts were made, prior to 1940, the respondent was not even a potential competitor of Warners for first run business. It had no theatre which it claimed to be suitable for the first run exhibition of pictures in Philadelphia. And nothing whatever in the Record warrants the statement that any distributor expressed an intention of

not supplying pictures for first run exhibition to the respondent, if and when it should acquire a suitably located first run theatre. The extreme statement which the Record warrants, is that no distributor desired to use the Erlanger Theatre as its first run outlet in Philadelphia.

The second expression of the trial judge at which the Circuit Court grasped to support its decision was a statement appearing on R. 977a as follows:

> "* * * and it may be said at the outset that the plaintiff's evidence establishes that, as the result of substantially uniform action of each distributor with Warners, Warner has obtained in Philadelphia a controlling position in the exhibition of first run Grade A feature pictures, which I shall assume can be properly described as a monopoly, according to the popular understanding and dictionary definitions of that term * * *".

Here the trial judge made what, we submit, was a careless statement.

The only uniform action which can be spelled out of the Record is that each distributor licensed its pictures for first run exhibition, at the only first run theatres available to it prior to the date of respondent's lease.

There was no evidence, and nothing from which an inference could be drawn, that any distributor had assisted Warners in acquiring any theatre prior to Warners' acquisition of the Fox Theatre in 1936. And there was no evidence, and nothing from which an inference could be drawn, that any distributor except Twentieth Century-Fox had anything whatever to do with Warners' lease of the Fox Theatre. Therefore, how uniform action—the licensing of their respective pictures to the operator of the available first run theatres in Philadelphia—could have had anything whatever to do with giving Warners "a controlling position in the exhibition of first run Grade A feature pictures" is completely illusory.

No evidence whatever supported the trial judge's statement as that statement has been interpreted by the Circuit Court, any more than any evidence supported his first statement which we have quoted.

The remaining material which the Circuit Court utilized in reversing the trial judge was his affirmance of four requests for findings of fact made by the respondent. We shall deal with these *seriatim*, first quoting them and then discussing them. They were:

> "19. With respect to size, location, appointments, management, reputation and all other respects, the Erlanger theatre is suitable for profitable exhibition of first-class feature motion pictures on first run in competition with the theatres operated by Stanley Company of America, Inc., in Philadelphia." (R. 936a)
>
> "22. After leasing the Erlanger theatre plaintiff repeatedly requested the distributor defendants to lease feature pictures for first run exhibition therein, and plaintiff in good faith offered to pay the defendants higher prices for pictures than the prices said defendants were receiving from Stanley Company of America, Inc." (R. 936a)
>
> "30. The distributor defendants have refused to lease pictures for exhibition at the Erlanger theatre but solely because that theatre was not under the control of Stanley Company of America, Inc., and if said theatre had been under the control of the Stanley Company of America, Inc., the distributor defendants would have leased pictures for exhibition therein at all times since November 9, 1940." (R. 937a)
>
> "31. Each and every distributor defendant as well as Vitagraph, Inc., knew that every other distributor defendant was leasing its feature pictures for first run exhibition in Philadelphia at the theatres operated by Stanley Company of America, Inc., to the exclusion of plaintiff's theatre." (R. 938a)

As to "19": Not a syllable of evidence in the Record demonstrates that the Erlanger Theatre was ever operated profitably at any time in its history. Therefore to say that it is suitable for profitable operation in competition with the Warner theatres is nothing but a guess,—and a bad guess which contradicts evidence from which the reason for the theatre's past failure is clearly inferable.

The history of the theatre (Ex. P-45, R. 1142a, 456a) shows conclusively that it could not have had a good reputation. Of the 670 weeks between the opening of the theatre and the date of respondent's lease it was dark 371 weeks. In 1939 it was open for only 22 weeks and in 1940 for only seven weeks. Also the fact that a $2,500,000 theatre could be rented for $12,000 a year negatives its suitability to compete with the Warner theatres, the rental for one of which—the Fox—was $134,000 a year (R. 121a).

As to location the trial judge found as a fact that the location of all of the Warner first run theatres is superior to that of the Erlanger (Affirmance of Warner Request No. 20, R. 947a). Therefore it is difficult to see how in location the Erlanger was suitable to compete with the Warner theatres, at least on an even basis.[1]

As to "22": The Record shows that prior to bringing suit, respondent offered 65% of the gross receipts to only three of the seven distributors. These three distributors were Paramount, RKO and Universal (see R. 1107a, 1041a, 1061a and 1081a). In the cases of Paramount and RKO respondent asked an opportunity to bid "for pictures which will be available for exhibition as the second group of five under the consent decree." He stated that he was willing to offer "any reasonable guarantee against 65% of the gross." It will be noted that Mr. Goldman knew all about

[1] Later at the damage trial practically all the defendants' witnesses testified that because of its inferior location and lack of reputation as an established motion picture house the Erlanger was far less desirable from a grossing standpoint than any of the Warner first run theatres.

the consent decree under which both Paramount, Fox and RKO were operating. They were not at this time licensing their pictures for one or more seasons as they had previously done.

To Universal, which was not operating under the consent decree, respondent made a general offer to purchase pictures for first run in Philadelphia. He said (R. 1081a) "naturally your pictures are not sold in the manner of other companies who come under the jurisdiction of the consent decree, and I am willing to entertain the purchase of your 1941-1942 pictures on the following basis." Thus respondent was offering to negotiate for the same type of license which the Circuit Court condemned in its opinion when Warners happened to be the licensee.

The three offers to which we have referred were made on September 29, 1941. Thirteen months later—on October 30, 1942—respondent wrote to a fourth distributor—United Artists—simply offering "a better guarantee and percentage than you have been receiving" (R. 1093a); and on April 24, 1943,—after bringing suit,—it wrote a somewhat similar letter to Twentieth Century-Fox (R. 1061a).

Respecting the offer of 65%, it was not made to all of the distributors, and, except in the case of Universal, it was made for only five pictures. Whether a higher percentage of the gross receipts at the Erlanger would be a "higher price" would all depend on whether the gross receipts there would be equal to the gross receipts at one of the Warner theatres.

The seating capacity of the Erlanger is but 1859, whereas the seating capacities of the larger Warner theatres are Boyd 2338; Earle 2764; Fox 2423; Mastbaum 4387; and Stanley 2911 (R. 1132a).

Finally, Mr. Goldman virtually conceded that his 65% offer was so high as to impugn its good faith. He admitted that at 70% no exhibitor could make money, and that the usual percentage for the best pictures was 35 to 40 (R. 427a).

As to "30": This request was simply "out of the blue". Not one bit of evidence justified it; and all of the proof pointed to a contrary inference. This proof consisted of the following facts:

(a) While Warners had a one-third interest in the Erlanger Theatre, Loew's, Paramount or Universal did not license a single picture for exhibition there (Ex. P-45, R. 1142a, 456a).

(b) After Warners reopened the Mastbaum in September 1942, Loew's, Paramount, Columbia, Universal and United Artists did not license their pictures for exhibition there at any time prior to the date of the suit (Ex. D-5, R. 783a, 1175a; D-9, R. 844a, 1179a; D-11, R. 884a, 1184a; D-12, R. 891a, 1185a; D-13, R. 911a, 1186a); and neither Loew's nor Paramount licensed any pictures at the Mastbaum up to October 15, 1943 when the answers to the Interrogatories were prepared (R. 49a, 53a; 85a, 83a).

(c) At various times within the period covered by the history of the Erlanger Theatre, disputes arose between Warners and certain distributors, as a result of which the distributors declined to license their pictures to Warners, but instead used inferior theatres, which they themselves operated until the disputes were settled. This Record shows three such instances:

RKO which used the Erlanger during part of the 1929-30 season (R. 105a); Loew's which used Keiths from September 1931 to February 1932 (R. 46a); and Paramount which used Keiths during the 1931-1932 season (R. 75a-76a).

These facts all lead to the inescapable conclusion that Warners does not have the ability to make the distributors license their pictures as Warner dictates. And there was no evidence whatever from any witness or in any exhibit indicating that if the Erlanger had been under the control of Warners any of the distributors would have

licensed pictures for exhibition there at all times since November 9, 1940, or at any time.

As to "31": On the subject matter of this finding there was no evidence whatever. Of course, every distributor by reading the newspapers and trade papers was in a position to know that no one was using the Erlanger as a first run theatre and that all of the distributors were licensing their pictures for first run exhibition at the Warner theatres. Even though the Record is silent on the subject, the petitioners have no desire to deny this fact.

However, the Circuit Court used the finding as if it imputed to each of the distributors knowledge of what the other distributors were going to decide as far as licensing their pictures for exhibition at the Erlanger was concerned. The Circuit Court made the finding look like evidence of concert of action. In that sense the finding is wholly unwarranted by anything whatever in the Record.

The same attacks which we make here against the foregoing findings and statements of the trial judge were made in every brief filed with the Circuit Court and at every oral argument. They were completely ignored. There is no discussion in any opinion of the propriety of these findings and statements, and respondent at no time brought to the attention of the Circuit Court anything which supported them. Indeed the only effort to justify any part of these findings and statements was made by the respondent in the bill of review proceeding where the contention was brought forth that because in its letters of January 25, 1941 to certain of the distributors (See R. 1033a, 1052a, 1068a, 1079a, 1086a, 1106a) respondent had made the statement that "RKO was eminently successful in this theatre as a first run", the court was justified in finding that the Erlanger had been operated profitably. However, a conclusive answer is that these letters were received in evidence only to establish that respondent had sought to obtain pictures. The Court said (R. 448a) "I will rule that

they are not to be used and will not be considered by me as proof of facts stated unless in some way they are acceded to or admitted or adopted in some way by the defendant * * *".

Eliminating the findings and statements which we have discussed and again turning to the Record, we submit that there is nothing in respondent's case which called upon petitioners for an explanation; and if these findings and statements (and paraphrases of them) were deleted from the opinion of the Circuit Court, its opinion would be utterly without foundation.

The refusal of the Circuit Court to weigh these statements of the trial judge against the evidence contained in the Record was certainly such a departure from the usual procedure on appeal as to challenge investigation by this Court.

In addition the Circuit Court completely ignored the findings of fact of the trial judge as quoted in the petition. Nothing in its opinion pointed to any evidence in the Record justifying the decision of the case without regard to the trial judge's findings on matters which were vital to the decision of the case.

Even more astounding were certain statements by the Circuit Court which were completely at variance with the Record.

In footnote 12 (R. 991a) the Circuit Court said:

> "While the court below did not specifically so find, the evidence is clear that plaintiff believed at the time it leased the Erlanger that it would be able to obtain the quality of pictures it desired from the distributor defendants. In fact, Paramount had informed plaintiff that it was dissatisfied with Warner Bros.

exhibition of its pictures and it was highly likely Paramount would lease to plaintiff instead of Warner Bros. if plaintiff acquired the Erlanger."

The trial court had specifically refused to find in accordance with the first part of this statement (see R. 937a) and found as a fact that prior to the execution of the lease respondent was informed by Paramount that its pictures would continue to be licensed for first run exhibition in the Warner theatres (affirmance of Warner Request No. 8, R. 944a; affirmance of Paramount Request No. 44, R. 963a). There was no evidence anywhere in the Record indicating that respondent had any idea that it would obtain pictures from any distributor if it leased the Erlanger.

Equally without justification was the Circuit Court's footnote No. 13 (R. 991a) stating that "plaintiff's inability to procure the feature pictures it desired was obviously not and could not be based on the fitness of plaintiff's theatre, which had never been used for subsequent run pictures".

The trial judge found as a fact that the location of the Erlanger was inferior to the Warner first run theatres (affirmance of Warner Request No. 20, R. 947a) and the history of the Erlanger (Exhibit P-45, R. 1142a) demonstrates clearly that the Erlanger was not a desirable theatre.

The Circuit Court's footnote No. 14 (R. 992a) is a contradiction by that Court of the trial court's affirmance of Warner Request No. 11 (R. 945a) and of his statement in refusing to affirm respondent's Request No. 29 (R. 934a) that "I do not regard the successful operation of that theatre [the Mastbaum] as evidence that from November 9, 1940 there was room for and need of a first run picture theatre in Philadelphia. And consequently I refuse Request No. 29".

Respondent's Request No. 29 asked the trial court to find that because on September 4, 1942 the reopening of the Mastbaum proved successful there was need for another theatre approximately two years earlier. In support of its footnote No. 14 the Circuit Court said:

> "We think there was ample evidence to support such a finding."

There was no evidence on the subject whatever.

At R. 995a the Circuit Court declared:

> "Plaintiff's evidence shows that there is concert of action in what has been done and that this concert could not possibly be sheer coincidence. Certainly there must have been some form of informal understanding."

For this conclusion, which is utterly at variance with the trial court's specific findings of fact, the Circuit Court did not point to anything in the Record justifying the statement. What evidence of respondent showed concert of action was left entirely to conjecture; and we submit that no evidence can be found anywhere in the Record which warrants such a statement.

In a case of this importance it is certainly contrary to customary appellate procedure to reject express findings of a trial judge and make statements of opposite conclusions without any discussion of the evidence. Certainly it would be hard to find a precedent in the decisions of this Court for such an arbitrary method of adjudicating important rights and liabilities.

In short, the Circuit Court seems to have proceeded on the assumption that because in several preceding cases this Court had decided against these petitioners under entirely different facts, these petitioners must have been guilty in

this case and that to reach that result any means was justified. No other theory can explain the resort to such an unusual course of procedure as that which the Circuit Court adopted here.

There Is No Basis for the Application of the Interstate Case Here.

After ignoring completely all findings of fact of the trial judge favorable to petitioners and relying exclusively on affirmances and statements which were wholly without support in the Record, the Circuit Court reached the conclusion (R. 995a) that the decision of this Court in **Interstate Circuit, Inc. v. United States**, 306 U. S. 208 (1939), 225-7, was applicable because the petitioners unanimously failed to produce evidence.

The same Circuit Court had correctly analyzed and applied the **Interstate** Case in **Schad v. Twentieth-Century Fox Film Corp.**, 136 F. (2d) 991 (1943) only two years previously. Indeed the analysis of the **Interstate** Case in the **Schad** Case can scarcely be improved upon; and although the trial judge relied on the **Schad** Case (see R. 987a), no mention of it was made in Judge Leahy's opinion (R. 989a) nor was any effort made to distinguish it.

The distinction between the **Interstate** Case and this case can be succinctly stated. In the former case a number of distributors uniformly adopted a new course of action which constituted a marked departure from their previous business practices. They did so after a demand addressed to them jointly by a large exhibitor chain. The practices which they adopted in response to the exhibitors' demand were oppressive to other exhibitors.

This Court felt that a simultaneous departure from existing methods of transacting business after a joint demand upon the distributors, as a consequence of which each

was bound to know of the demands made on the others, required an explanation, and the best explanation which the distributors could give.

The distributors did produce evidence, but the evidence was that of mere subordinates who were not in a position to testify first hand that there had not been an agreement among the distributors.

In the instant case there was no joint demand, no evidence that each distributor knew that a similar demand had been made on other distributors, no departure from prior policies or practices. In short nothing which could if unexplained lead only to the inference that there must have been an understanding between those who—the trial court found—had acted independently in refusing to license their pictures for exhibition at the Erlanger Theatre.

Counsel for the petitioners were unanimously of the opinion that the plaintiff had not established a *prima facie* case and advised their clients that answering evidence was unnecessary. For unanimity of inaction due to unanimity of advice by trial counsel, a conspiracy was inferred against petitioners. More fundamentally we submit that we have shown that a conspiracy has been inferred solely because petitioners did not explain away non-existent facts.

This seems to us to be a result so far at variance with what this Court intended in the **Interstate** Case as to call for the granting of the petition for certiorari.

But that is not all. Even though, at the damage hearing, petitioners were not permitted to offer direct evidence negativing conspiracy, their evidence on damages completely answered any possible contention that an inferred conspiracy was the *only* explanation deducible from the Record for the distributors' unanimous declination to accept the Erlanger as a first run substitute for the Warner

theatres. It was conclusively shown—and the trial judge found—that in three respects the Erlanger was inferior to the Warner theatres, and that these factors would reduce gross receipts—and therefore film rentals—on any picture exhibited there.

Thus, even if prior to the damage trial there had been a justification for applying the **Interstate** Case, that justification no longer existed. The evidence and the findings at the damage trial clearly converted the case into the pattern of **Pennsylvania Railroad v. Chamberlain**, 288 U. S. 333, 339 (1933). If before the damage trial there was only one possible inference—conspiracy—after the damage trial there were two inferences possible—either conspiracy or economic self interest on the part of each distributor.

The Bigelow Case Does Not Sustain an Award of Damages.

We have in the petition stated the facts relating to the trial on damages.

The plaintiff presented no evidence of the prior earnings of the Erlanger theatre and no evidence that in any one's opinion—not even Mr. Goldman's—the Erlanger's gross business would equal or approximate that of any of the Warner theatres, much less of the "average Warner theatre".

The only evidence upon which the trial judge was asked to assess damages consisted of a statement of the gross receipts, the expenses and the profits of five of Warners' first run theatres selected by the plaintiff. (See Ex. p. 48, R. 479a, 1159a.)

We submit that in no case has this Court sanctioned the award of damages on a purely speculative basis such as this, and that **Bigelow, et al. v. RKO Radio Pictures, Inc., et al.** 327 U. S. 251 (1946) by no means warrants the applica-

tion which the trial court made of it and which the Circuit Court affirmed *per curiam.*

In no other motion picture anti-trust case which has come before this Court, has the fact of damage been found where the weight of the evidence compelled the conclusion that, absent any conspiracy and in a free market, plaintiff's theatre would have failed to earn profits, and in consequence that it was not the alleged conspiracy, but rather the fact that plaintiff had an unsuccessful theatre which caused plaintiff's loss.

In no other case before this Court has the measure of damages been based on such wide speculation, for in **Story Parchment Co. v. Paterson Co.**, 282 U. S. 555 (1937) and **Eastman Kodak Company v. Southern Photo Materials Company**, 273 U. S. 359 (1925), there were in evidence records of the earnings of the plaintiff's enterprises prior to the conspiracy.

And although in the **Bigelow** Case, the plaintiff put in evidence not only the record of its own theatre's earnings prior to the conspiracy, but also the record of earnings of a particular theatre of defendant which had been proved comparable but inferior to plaintiff's theatre, it is clear from the record that it was upon the first theory that the jury measured damages. Any approval given by this Court to the second theory was purely dictum.

There Is a Direct Conflict Between the Third Circuit and the Second and Eighth Circuits as to the Rule of Damages in This Case.

In this case the Circuit Court permitted an award of damages without any proof of prior profits earned by respondent's theatre.

In **Central Coal & Coke Company, et al. v. Hartman**, 111 Fed. 96 (1901) the Circuit Court of the Eighth Circuit, and in **Baush Mach. Tool Co. v. Aluminum Company of America**, 79 F. (2d) 217, the Circuit Court of the Second

Circuit, expressly held that in damage cases under the Sherman Act there must be a history of prior earnings to serve as a basis for the estimation of future profits.

The conflict is obvious.

There Is a Direct Conflict Between the Second and Third Circuits as to the Monopoly Phase of This Case.

In effect the Circuit Court in this case decided that the fact that one company operated all the first run theatres in Philadelphia, there being no proof of any predatory or coercive or other unlawful practices, in the acquisition of any theatre, was *per se* a violation of Section 2 of the Sherman Act.

In **United States v. Paramount Pictures, Inc., et al.**, 66 F. Supp. 323 (D. C. S. D. N. Y. 1946), now pending in this Court, Judge Hand said in his opinion at page 354:

> "If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendant, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures. Record p. 1062.
>
> "As was said by the expediting court in United States v. The Pullman Co., D. C. E. D. Pa., 1945, 64

F. Supp. 108, 112: 'If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel every one to trade with him exclusively that the situation becomes legally objectionable.' "

The conflict between the two cases is obvious.

Conclusion

Apart from the palpable injustice which results from the decision of the Circuit Court of Appeals, if the decision in this case is permitted to stand:

(1) The decision of this Court in the **Interstate** Case will either have had a completely new and different significance added to it by a Circuit Court of Appeals, or its meaning will have been completely obscured.

(2) In the upwards of 50 anti-trust cases pending against one or more of these petitioners in the federal courts, and any other cases which the decision in this case may inspire, no defendant, however thin the plaintiff's evidence in support of charges of violation of the Sherman Act may be, will dare to refrain from presenting a complete defense. Hundreds, if not thousands, of days of court time will be wasted and an inestimable amount of needless expense will be incurred.

(3) All a plaintiff in an anti-trust case against these petitioners will have to do to recover huge sums of money is (a) acquire a theatre which in its many years of existence no one had ever presumed to argue was suitable as a regular first run theatre, (b) make demands for pictures then being licensed in superior theatres and on the run they are licensed for and (c) failing to secure such pictures, prove not that its theatre had ever been regularly operated as a first

run theatre or had ever made any money on any basis, but merely that other better located theatres had grossed certain sums and made profits.

In the light of the trial judge's modified findings made upon the conclusion of the damage trial, (See R. 1010a, 1011a) it is obvious that any distributor licensing its pictures for exhibition first run at the Erlanger instead of at the better located Warner first run theatres, would have done so at a financial loss. The trial judge found that an inferior location, a lack of reputation as a motion picture theatre, and lack of air conditioning would have had an adverse effect on gross receipts; and a distributor's rental depends on the amount of gross receipts.

Thus, no distributor could be expected voluntarily to select the Erlanger instead of the better Warner theatres as its outlet for first run exhibition. As the case stands, a conspiracy has been inferred against the petitioners merely because all of them did what each of them separately would naturally be expected to do, and legally had a right to do.

A result such as this was certainly never within the contemplation of Congress when the Sherman Act was passed, nor of this Court when it rendered any of its decisions interpreting the Act.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

LOEW'S INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, STANLEY COMPANY OF AMERICA, INC., UNIVERSAL FILM EXCHANGES, INC. and UNITED ARTISTS CORPORATION,
Petitioners,

v.

WILLIAM GOLDMAN THEATRES, INC.,
Respondent.

BRIEF OF WARNER DEFENDANTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

A matter of enormous public interest is here involved. As was developed on the argument in *United States* v. *Paramount*, there are more than 60 treble damage cases pending against these defendants, involving many millions of dollars. Here, the Circuit Court has made the astounding decision that these damages may be proved by showing the profits of the defendants' theatres and making a guess as to how much less profitable plaintiff's theatre might

have been than the defendants' and arbitrarily making an allowance out of thin air. It sets a rule of damage by which any plaintiff can come into court and say that the defendants' theatres made so much money and that his theatre is not as good as the defendants' theatres, but that the court can speculate that if the defendants had not exercised their prerogative of showing their pictures in the best theatres and had been willing to show pictures in a concededly inferior theatre, that damages can be estimated by having the court make a rule-of-thumb decision that while plaintiff's theatre was distinctly inferior to defendants', it was only X% inferior.

Opinions Below

The substance of the various opinions below is summarized in the "Statement of the Case" which follows.

The opinion of the Circuit Court of Appeals from which this appeal is taken appears at R. 1342. It has not yet been reported. The prior opinion of the Circuit Court of Appeals, dealing with liability, is reported at 150 F. (2d) 738 (1945).

The opinion of the Circuit Court of Appeals in the Bill of Review proceeding is reported in 163 F. (2d) 241 (1947).

The two opinions of Judge Kirkpatrick of the District Court are reported, respectively, at 54 F. Supp. 1011 (1944) and 69 F. Supp. 103 (1946).

Jurisdiction

(a) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937, 28 U. S. C. A. 347 (a).

(b) The federal questions presented arise under the Sherman Act, 26 Stat. 209, 15 U. S. C. A. 1-7, and the Clayton Act, 38 Stat. 731, 15 U. S. C. A. 14-27.

(c) The action of the United States Circuit Court of Appeals for the Third Circuit, review of which is sought by petitioners, is the final judgment entered January 6, 1948, and the interlocutory orders which necessarily affected the final judgment, entered August 2, 1945, reversing the judgment of the District Court, for the Eastern District of Pennsylvania, dated April 8, 1944, which dismissed the complaint, and the order entered August 11, 1947 denying petitioners' applications for bill of review.

Statement of the Case

The suit sought injunctive relief and damages under the Clayton and Sherman Acts for the alleged improper refusal of eight motion picture companies (the same companies as were defendants in *United States* v. *Paramount*, appeal now pending in this Court), to license any of their very best features for first run exhibition at The Erlanger Theatre in Philadelphia, a theatre which plaintiff had rented at a nominal rental after it had been abandoned by its former owner, Warner, and had stood virtually idle for many, many years.

The complaint alleged that such refusal to license The Erlanger was due to a conspiracy of the defendants to license their very best features on first run in Philadelphia only in Warner controlled theatres.

The District Court found as a fact that each defendant had "separately decided" its course of conduct (No. 28, R. 949a) and that there was no evidence from which it could draw "the factual inference that any of the defendants • • • did not act independently in the exercise of sound business judgment" (No. 31, R. 950a). It refused to draw an inference of illegal intent from the mere licenses themselves because it found Warner's position "amounts at best to a partial control of the business of exhibiting motion

pictures in a limited area" and in cases of such partial control the illegal intent to restrain is not a "necessary inference" but "remains a fact to be proved". Kirkpatrick, Dt. J., wrote (R. 983a [54 F. Supp. 1011, 1016]):

> "In the present case, whatever Warner's position may be called, it amounts at best to a partial control of the business of exhibiting motion pictures in a limited area. Although I have so assumed, it is by no means certain that it even meets the popular conception of monopoly at all. Warner operates only a small part of the total number of theatres in Philadelphia. Every picture it exhibits, may be, and most of them are, shown in other theatres, though, of course, at a later date. This case clearly falls into the class which the Expediting Court referred to as 'cases where the court struggled with the question of the legal effect of partial control of a given market.' The distinction seems to be that, where the monopoly is complete, absolute and nation-wide in the whole industry, the illegal intent to restrain interstate commerce is a necessary inference, whereas in cases of partial or local control the illegal purpose remains a fact to be proved and may be proved only by what has been done or by direct evidence of the purpose of the combination, not by what might have been done. And so, in a case which involves as limited a control as the present one, I think that the criterion is not whether there is a possibility of restraint in interstate commerce, but whether the control actually accomplishes or is intended to accomplish such undue or unreasonable restraint. Evidence of such results or intent is lacking."

The Circuit Court of Appeals reversed the dismissal below, holding that because of defendants' failure to call witnesses, *Interstate Circuit* v. *United States,* 306 U. S. 208 required or authorized an inference of illegal combination, and remanded the case with directions to make such an inference and finding, to enter an appropriate decree and to assess damage, observing (R. 998a [150 Fed. 2d at 745]):

> "Perhaps, upon remand plaintiff may be able to prove its damages; or, the factors to be considered may be subject to so many unknowns that such damages may veer toward the speculative."

On the second or continued trial, the District Court found that, but for the conspiracy, the Erlanger would have made $125,000 profit in 15 months,* basing this estimate on the actual grosses of four of the best Warner first run theatres, discounted for such factors as established the inferiority of the Erlanger as compared with those Warner theatres (R. 1010a [69 F. Supp. at 108-109]).

A final decree was entered for treble damages in the sum of $375,000 plus $60,000 attorneys fees, and an injunction, which has been carried out, inter alia, by competitive bidding for pictures for first run Philadelphia.

After an appeal had been taken, defendants moved the Circuit Court for leave to file a bill of review for new matter arising after the entry of the decree.

The new matter consisted of this: that plaintiff had constructed a new theatre, The Goldman Theatre, and had converted the 2nd run Karlton Theatre into a 1st run theatre; that plaintiff had chosen to bid for type A pictures offered it for The Goldman and The Karlton Theatres, and even a third theatre, the Keiths, all in preference to the Erlanger, and had by thus continuing

* Damages for the four year period after December 8, 1942 are sought in another action, about to be tried.

to keep the Erlanger dark, demonstrated the sound business judgment of each of the defendants and the impropriety of inferring conspiracy, and of speculating that the Erlanger might have earned $125,000 in 15 months. The petition was denied, the Circuit Court indicating, inter alia, that such evidence was irrelevant (163 F. 2d at 243).

The judgment was then affirmed, the Circuit Court reiterating its position that its finding of liability was justified by *Interstate Circuit* v. *United States*, 306 U. S. 208, and its finding of damage by *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

Reason for a separate Warner Brief

Because our approach is different from that of the other petitioning defendants, we file a separate brief in support of the joint petition for certiorari.

Warner does not object, and has never objected, to other distributors licensing any of their features first run to any theatre which they or any of them deem suitable.

If, as a result of honest judgment, they or any of them in the past chose Warner theatres as more suitable, with the result that they licensed primarily Warner theatres first run, the result (if monopolistic as to the best pictures first run) was not Warner monopolization or a combination to make Warner a monopoly of the best pictures first run.

The result was that a "monopoly" of the best pictures on the best run in the best theatres was thrust upon Warner—as a result of the inevitable—that the best would seek the best outlets,—as inevitable as that the *public* would decide which were the best pictures and that *the public* would prefer to see the *best* pictures in the *best* theatres on a preferred run.

Warner, therefore, did not achieve a "monopoly".

The public taste "thrust" a monopoly upon the best theatres. Apposite is the aphorism of Learned Hand, Ct. J., in the *Aluminum* case quoted with approval by this Court in *American Tobacco Co.* v. *United States,* 328 U. S. at 813:

> "• • • it may not have achieved monopoly; monopoly may have been thrust upon it."

This is conclusively demonstrated by the salient fact that when plaintiff opened a new and suitable theatre, the Goldman Theatre, it was immediately supplied with sufficient of the best pictures first run to operate successfully; and that *plaintiff chose as a matter of its own preference to play the best pictures offered it first run in The Goldman Theatre* and not The Erlanger Theatre, the theatre which was the subject of the alleged exclusionary conspiracy to monopolize below.

As a result of opening a better theatre than The Erlanger, the question of monopolization has become academic.

The only question that still remains,—and the *main reason that Warner seeks certiorari,*—is to review the question as to whether plaintiff is entitled to *recover millions of dollars because it did not have as good a theatre as the new Goldman Theatre in the years past.*

The Warner defendants therefore ask certiorari primarily because the issues affect the damages assessed.

Questions Presented

1.) The Courts below erred in assessing damage (to be trebled) on the basis of estimated lost profits of a closed theatre instead of actual damage. In so holding, they

erroneously relied upon *Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 327 U. S. 251. In the *Bigelow* case, although this Court specifically left undecided the adequacy of the evidence on this phase, there was a basis for such an estimate in the evidence of grosses *actually earned* by a theatre *found to be inferior* to plaintiff's *and expert testimony as to what plaintiff's better theatre which had been operated for years could have grossed* (327 U. S. at 266, 258). There was no such evidence in this record. Contrast the findings in this case of the "unfavorable factors" mitigating against the Erlanger and in favor of the Warner theatres (R. 1010a [69 F. Supp. at 108-109]) with the situation in the *Bigelow* case, where on an appeal subsequent to this Court's decision, the Circuit Court of Appeals pointed to "the fact that the plaintiff's theatre had a superior location and equipment and was more attractive than the Maryland Theatre operated by one of the defendants" (*Bigelow* v. *R.K.O. Radio Pictures*, 162 F. (2d) at 522).

2.) The Circuit Court of Appeals erred in holding that the *Interstate* case required the District Court below to infer conspiracy from the failure to call witnesses. At most, the *Interstate* case held that the District Court had not erred in that case by inferring conspiracy from the failure to call witnesses where the United States had presented a case which logically required answer. Here, the District Court below had found as a fact that each defendant "separately decided" its course of conduct (No. 28, R. 949a) and that there was no evidence from which it could draw "the factual inference that any of the defendants * * * did not act independently in the exercise of a sound business judgment" (No. 31, R. 950a). The Circuit Court of Appeals, relying on *Interstate Cir-*

cuit v. *United States*, 306 U. S. 208, either drew or directed the District Court to draw adverse inferences which the District Court as trier of the facts had declined to draw. But the *Interstate* case held no more than that the adverse inferences actually drawn by the District Court were permissible.

3.) The Circuit Court of Appeals erred in holding that plaintiff had presented a case which logically required answer, i.e. that the mere fact that each of the defendants had licensed their best pictures first run to theatres owned or controlled by Warner logically required *oral* testimony from the defendants in addition to their answers to plaintiff's interrogatories which plaintiff offered in evidence and which had stated that such licenses had been made in the exercise of their best business judgment (R. 48a, 84a, 108a, 141a, 263a). In so holding, the Circuit Court of Appeals relied substantially upon its conclusion that an intent to conspire was "necessarily inferable from the contracts themselves—to exclude the plaintiff and all others except Warner from the first run business," i.e. that whenever all (or the only) first run theatres in a city are owned by a single person, plaintiff had presented a case which logically required answer. As stated by Parker, Ct. J., on the petition for bill of review (163 F. 2d 241, 243):

> "That conclusion [on the issue of conspiracy], as the opinion shows, rested on a far broader foundation than that plaintiff was denied first run pictures for a theatre that he could operate profitably. We found on the whole record that a conspiracy in restraint of trade on the part of defendants existed and we quoted from the opinion of the lower court a sentence to the effect that the intent was 'patent—

> necessarily inferable from the contracts themselves —to exclude the plaintiff and all others except Warner from the first run business'."

4.) If the Circuit Court held that the mere fact that all the defendants had licensed their best pictures first run in Warner theatres constituted a violation of the Act, it was in error and in conflict with the views expressed by Augustus Hand, Ct. J., for the statutory court in *United States* v. *Paramount,* appeal now pending in this Court (66 F. Supp. at 354):

> "If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership."

5.) The Circuit Court was in error in reversing the District Court's conclusion as stated in the last paragraph of its original opinion (R. 983a [54 F. Supp. at 1016] previously quoted under "Statement of the Case") that where there is at best "a partial control of the business of exhibiting motion pictures in a limited area" the illegal intent to restrain is not "a necessary inference" but "remains a fact to be proved and may be proved only by what has

been done or by direct evidence of the purpose of the combination, not by what might have been done."

6.) If any adverse inferences were to be drawn from failure to take the stand on the issue of liability, *a fortiori*, the courts below erred in failing to draw adverse inferences against Goldman (plaintiff's president) for his failure to take the stand on the issue of damage litigated on the second or continued trial—especially in view of the District Court's statement below that a plaintiff "of course must always produce all the evidence that he can" (R. 1004a [69 F. Supp. at 106]).

Respectfully submitted,

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